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IN THE

Supreme Court of the United States

October Term, 1968

NO. 1128

CONSOLIDATED COPPERSTATE LINES,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From The United States District Court For The Central District of California

MOTION TO AFFIRM

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Red Ball Motor Freight, Inc
Saia Motor Freight Line, Inc.

FIRM FOUNDATION—AUSTIN

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) appellees Central Freight Lines Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., move that the judgment of the district court be affirmed because it is manifest that the questions presented are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A) affirming a

report and order of the Interstate Commerce Commission (J.S. App. B). The Commission denied appellant authority to purchase the operating rights of England Transportation Company of Texas (England of Texas) and a portion of the operating rights of England Transportation Co., Inc. (England), under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), and denied appellant's application to operate over specified regular routes between Houston, Texas, and New Orleans, Louisiana, serving intermediate points thereon, under Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307.

On July 7, 1964, appellant filed its application to purchase the England of Texas rights and a portion of the England rights. By an order of September 30, 1964, the Commission granted appellant's application under Section 210a(b) of the Act, 49 U.S.C. § 310a(b), for temporary authority to lease the rights sought to be acquired from England and certain of the rights sought to be acquired from England of Texas. Temporary operations under such authority were commenced by appellant on October 28, 1964. On December 21, 1964, appellant filed its application to operate over regular routes in the same areas as a portion of the irregular-route operating rights it sought to purchase. Both applications were heard on a common record and were opposed by motor carrier appellees. On May 16, 1966, the hearing examiner recommended approval, with modifications, of the Section 5 purchase application and recommended the grant, with certain exceptions, of the Section 207 extension application (J.S. App. C).

On August 15, 1967, the Commission served its report and order in which it denied both applications, finding that the transaction proposed in the Section 5 application had not been shown to be consistent with the public interest and that the operations proposed in the Section 207 applications were not required by the public convenience and necessity (J.S. App. B). The Commission further found that a new and totally different service would occur with the England companies' operating rights in the hands of appellant, that both England and appellant had engaged in unlawful operations, that much of the traffic appellant would generate would be at the expense of existing carriers, and that the lack of need shown for an extension of appellant's authority, coupled with the questionable aspect of its fitness, impelled denial of the Section 207 application (J.S. App. B, 42-48).

Appellant filed a petition for reconsideration which the Commission denied by its order of March 4, 1969 (J.S. App. D).

Appellant instituted an action in the district court to set aside the Commission's report and orders (J.S. App. A, 1). The Court below found that the Commission's report rationally segregates and disposes of all issues raised in each proceeding and that the Commission's orders were based on substantial evidence and according to the applicable law (J.S. App. A, 5).

During the pendency of this litigation appellant has continued to conduct operations under temporary authority by virtue of (1) a temporary restraining order granted by the district court pending trial on the

merits and (2) a stay order issued by Mr. Justice Harlan pending this Court's action on the Jurisdictional Statement.

ARGUMENT

The judgment of the district court affirming the Commission's order is clearly correct for the reasons therein stated.

Appellant's jurisdictional statement presents three questions. The contention accorded principal emphasis is that the Commission did not consider relevant evidence to determine where the public interest lay. Such contention is without merit. The Commission considered, *inter alia*, that the England companies and appellant had engaged in unlawful operations (J.S. App. B, 40-42), that the England companies ". . . did not operate directly to other Texas points nor was the traffic which England (Tex.) interlined at Houston with other carriers a significant factor—certainly not when compared with the new and totally different service or the magnitude of use which would occur with the operating rights in the hands of Copperstate . . ." (J.S. App. B, 42), that appellant's shipper witnesses failed to show a need for any service that cannot be supplied by existing carriers (J.S. App. B, 47), and that much of the traffic appellant would generate would be at the expense of existing carriers (J.S. App. B, 47). Section 5(2) ". . . entrusts the Commission with the duty to decide what considerations . . . shall be given weight." *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 127, 83 S.Ct.

217, 225 (1962). *Cf. McLean Trucking Co. v. United States*, 321 U.S. 67, 64 S.Ct. 370 (1944). "The fitness of an applicant for authority to extend its operations under section 5 through the acquisition of additional motor-carrier operating rights is one of the most important questions involved in determining whether a proposed transaction would be consistent with the public interest." *Be-Mac Transport Co., Inc.—Purchase*—Nix, 87 M.C.C. 737, 741 (Div. 3, 1961). This Court recognized the relevance of prior unlawful operations to the issue of consistency with the public interest in *Gilbertville Trucking Co. v. United States, supra.* And the Commission has repeatedly found that the public interest requires disapproval in whole or in part of a proposed unification where new competitive service would result without a showing that such resulting new service would be responsive to a public need for adequate service not being met by existing carriers.* One of the most recent cases affirming the

*The following are representative of the Commission's consistent holdings requiring proof of public need in Section 5 cases to warrant either reactivation, transfer and unification or any other new competitive use of vendor's certificated rights. *Compare Crichton*, 35 M.C.C. 661, 664 (Div. 4, 1940) and *Quaker City*, 38 M.C.C. 603 (Full Com., 1942) *with Adkins*, 38 M.C.C. 240, 243 (Div. 4, 1942); *Falwell*, 40 M.C.C. 439 (Full Com., 1946), *affirmed, Falwell v. United States*, 69 F. Supp. 71 (W.D. Va., 1946), *aff'd per curiam*, 330 U.S. 807, 67 S.Ct. 1087 (1947); *La Mere*, 55 M.C.C. 501 (Div. 4, 1949); *Transcon*, 56 M.C.C. 521 (Full Com., 1950); *Shein*, 46 M.C.C. 711 (Div. 4, 1950), *affirmed, Shein v. United States*, 102 F.Supp. 320 (N.J., 1951), *aff'd per curiam*, 343 U.S. 944, 72 S.Ct. 1043 (1952); *Houff*, (not printed), *affirmed*,

Commission's observance of these criteria was cited by the district court. *Braswell Motor Freight Lines, Inc. v. United States*, 275 F.Supp. 98 (W.D. Tex., 1967), *aff'd per curiam*, 389 U.S. 569, *rehearing denied*, 390 U.S. 975 (1968).

Appellant's second contention is that the Commission arbitrarily segregated its discussion of the evidence in the assailed report. The court below appropriately disposed of this contention by holding that "[f]orm does not govern substance, and the Commission's findings in the § 207 proceedings are fully applicable to the same issues in the § 5 matters . . ." (J.S. App. A, 5). To argue that the Commission considered the section 5 case in some sort of isolated vacuum is clearly unwarranted when the Commission's report is examined.

Appellant's remaining contention is, in essence, that the Commission approved a transaction proposed in another section 5 application* involving prior unlawful activities only a few weeks before it denied appellant's applications and that this constitutes a "shocking disparity in treatment . . . ." But whether the Commission has given more or less weight to certain

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Houff Transfer, Inc. v. United States, 105 F.Supp. 851 (W.D. Va., 1952); *Cooper*, 58 M.C.C. 283 (Full Com., 1952); *Ratner*, 70 M.C.C. 251 (Div. 4, 1956), *affirmed, Ratner v. United States*, 162 F.Supp. 518 (S.D. Ill., 1957), *aff'd per curiam*, 365 U.S. 368, 78 S.Ct. 913 (1958); *C & H Transportation Co. v. United States*, 249 F.Supp. 97 (N.D. Tex., 1965).

**Consolidated Freightways of Delaware—Control—Southern Plaza Express, Inc.*, 104 M.C.C. 194 (1967).

factors in one case than it has in another is not determinative of the validity of the Commission's action. *Virginian Ry. v. United States*, 272 U.S. 658, 665-666, 47 S.Ct. 225 (1926); *Whitehouse Trucking, Inc. v. United States*, 261 F.Supp. 9, 11 (N.D. Ohio, 1966), *aff'd per curiam*, 388 U.S. 453, 87 S.Ct. 2111 (1967); *Watkins Motor Lines, Inc. v. United States*, 243 F. Supp. 436, 443 n. 11 (D. Neb., 1965); *Ace Lines, Inc. v. United States*, 197 F.Supp. 591, 599 (S.D. Iowa, 1960). Instead, the test of review is that set forth in the decision of the Court below (J.S. App. A, 4-5).

CONCLUSION AND PRAYER

For the foregoing reasons appellees submit that this appeal presents no substantial question warranting oral submission and full consideration. Therefore, the judgment of the district court should be affirmed, and appellees so pray.

Respectfully submitted,

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Central Freight Lines Inc.
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PROOF OF SERVICE

I, Phillip Robinson, attorney for appellees Central Freight Lines Inc., Red Ball Motor Freight, Inc., and Saia Motor Freight Line, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of April, 1969, I served copies of the foregoing Motion to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; and to Hon. Nahum Litt, Attorney, Office of the General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

2. On the attorneys for appellant here, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to David Axelrod, Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; and Ball, Hunt, Hart & Brown, 120 Linden Avenue, Long Beach, California 90802.

4. On the attorneys for other appellees herein, by mailing copies thereof, in duly addressed envelopes, with air mail postage prepaid, to M. Ward Bailey and

T. S. Christopher, Christopher & Bailey, 2412 Continental Life Building, Fort Worth, Texas 76102; Phineas Stevens, Suite 700, Petroleum Building, P. O. Box 1250, Jackson, Mississippi 39205; James Wrape and Robert E. Joyner, 2111 Sterick Building, Memphis, Tennessee 38103; Leroy Hallman, and William E. Livingstone, Phinney, Hallman, Pulley & Livingstone, 4555 First National Bank Building, Dallas, Texas 75202; Reagan Sayers and Clayte Binion, Rawlings, Sayers & Scurlock, P. O. Box 17007, Fort Worth, Texas 76102; Maurice E. Hibbert and Warren N. Grossman, Knapp, Gill, Hibbert & Stevens, 825 City National Bank Building, 606 South Olive Street, Los Angeles, California 90014; W. D. Beatenbough, Vice President-Traffic, Ryder Truck Lines, Inc., P. O. Box 2408, Jacksonville, Florida 32203; Charles L. Ford, Texas Railroad Association, P. O. Box 1767, Austin, Texas 78767; Rollo E. Kidwell, P. O. Box 10125, Dallas, Texas 75207; Charles D. Mathews, P. O. Box 47407, Dallas, Texas 75247; Hugh T. Matthews, Brooks, Montgomery & Matthews, 630 Fidelity Union Tower, Dallas, Texas 75201; Franklin H. Wilson, McCutchen, Black, Verleger & Shea, 615 South Flower Street, Los Angeles, California 90017; and Theodore W. Russell and Robert Y. Schureman, 1545 Wilshire Boulevard, Los Angeles, California 90017.

5. On the attorney for Strickland Transportation Transportation Company, intervening plaintiff below, by mailing copies thereof, in duly addressed envelopes,

with air mail postage prepaid, to Dennis G. Lyons, 1229 Nineteenth Street, N. W., Washington, D. C. 20036.

Phillip Robinson

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